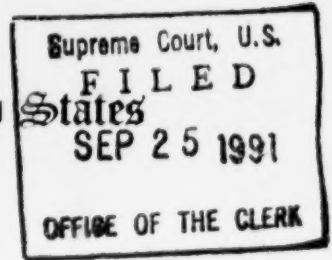


91-580 1

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991



JOHN R. KOLSTAD,

Petitioner,

vs.

UNITED STATES OF AMERICA
(INTERNAL REVENUE SERVICE),

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. May a court interpret and apply Federal Rule of Bankruptcy Procedure 3004 in direct contradiction to the interpretation set forth in the accompanying Rule 3004 Advisory Committee Note?
2. Does a debtor's proof of claim filed pursuant to Federal Rule of Bankruptcy Procedure 3004 resurrect a creditor's expired right to file a claim, resulting in a creditor's post-bar date claim superseding a debtor-filed proof of claim?

RULE 29.1 LIST OF PARTIES

The parties to the proceeding in the Fifth Circuit Court of Appeals and other courts below are JOHN R. KOLSTAD (an individual who is a reorganized Chapter 11 debtor and Petitioner herein) and the UNITED STATES OF AMERICA, through its agency the INTERNAL REVENUE SERVICE (Respondent herein).

There are no corporations or other government agencies who are parties to this proceeding.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOHN R. KOLSTAD,

Petitioner,

VS.

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(INTERNAL REVENUE SERVICE),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, JOHN R. KOLSTAD, respectfully prays that this Court review the "reinstating filing rights/superseding claims" issues judicially created from Federal Rule of Bankruptcy Procedure 3004 (hereinafter "Bankruptcy Rule 3004"), on grounds that the United States Court of Appeals for the Fifth Circuit has decided an important question of federal bankruptcy law which has not been, but should be, settled by this Court.

OPINIONS BELOW

The Bankruptcy Court Opinion is reported as *In re Kolstad (United States of America, Internal Revenue Service vs. Kolstad)*, 101 B.R. 492 (Bankr. S.D. Tex. 1989), and is reproduced as Appendix C.

— The District Court's unpublished Memorandum Opinion is reproduced as Appendix B.

The Fifth Circuit Court of Appeals' Opinion is reported as *In re Kolstad (United States of America, Internal Revenue Service vs. Kolstad)*, 928 F.2d 171 (5th Cir. 1991), *reh'g and reh'g en banc den'd* 936 F.2d 571 (Table) and is reproduced as Appendix A.

JURISDICTION

The Fifth Circuit Court of Appeals' Judgement and Opinion were filed on April 10, 1991.

The Fifth Circuit Court of Appeals' (hereinafter "Fifth Circuit") denial of rehearing and rehearing en banc was filed on June 27, 1991.

Petitioner believes that this Court has jurisdiction to review the judgment and opinion of the Fifth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254.

STATUTES & RULES INVOLVED IN THIS CASE

Filing of proofs of claims or interests.

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

11 U.S.C. § 501(a).

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

11 U.S.C. § 501(c).

Allowance of claims or interests.

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

11 U.S.C. § 502(a).

Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases.

(c) Filing Proof of Claim.

(2) **Who Must File.** Any creditor or equity security holder whose claim or interest is not scheduled or

scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

Fed. R. Bankr. Pro. 3003(c)(2) (1987).

(3) **Time for Filing.** The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed.

Fed. R. Bankr. Pro. 3003(c)(3) (1987).

(3) **Time for Filing.** The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. *Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).*

Fed. R. Bankr. 3003(c)(3) (1991 *amendments*).

Filing Proof of Claim or Interest.

(c) **Time for Filing.** In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court

may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract or *unexpired lease* of the debtor may be filed within such time as the court may direct.

Federal Rule of Bankruptcy 3002(c)(2)-(4) (1991).

Filing of Claims by Debtor or Trustee.

If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days after expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith mail notice of the filing to the creditor, the debtor and the trustee. A proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by debtor or trustee.

Fed. R. Bankr. 3004 (1987).

STATEMENT OF THE CASE

1. On March 23, 1987, John R. Kolstad filed a voluntary Chapter 11 Bankruptcy Petition together with Schedules which listed the Internal Revenue Service (hereinafter "IRS") as a "disputed creditor" in the amount of \$20,359.71.
2. The IRS timely received notice of the Bankruptcy Case and claims filing bar date.
3. The IRS failed to timely file a proof of claim prior to the creditor's claims bar date set by the Court pursuant to Bankruptcy Rule 3003(c)(3).
4. Subsequent to the creditors' bar date, John R. Kolstad timely filed and served on the IRS a Debtor-filed proof of claim pursuant to Bankruptcy Rule 3004 for the amount listed in the schedules, \$20,359.71. Two (2) days thereafter, the IRS received Debtor's proof of claim.
5. Debtor's proof of claim on behalf of the IRS was calculated from Debtor's information and belief of the amount owing by any and all corporations for which John R. Kolstad could be deemed a control person prior to John R. Kolstad resigning from corporate office and having no power over the corporate records and directives. The IRS has never offered contrary evidence.
6. The IRS did not file an objection to Debtor's proof of claim, did not otherwise respond to any of the notices received, did not file a motion for further time to file proof of claim due to excusable neglect as authorized by Bankruptcy Rule 9006(b), and did not otherwise move for

an extension of time to file a claim for cause shown under Bankruptcy Rule 3003(c)(3).

7. Virtually on the eve of plan confirmation, approximately ten (10) months subsequent to the bar date for all creditors to file proof of claims and approximately nine (9) months subsequent to the IRS receiving the Debtor-filed proof of claim, the IRS filed an "amended" proof of claim in an amount approximately three hundred percent (300%) more than the Debtor's proof of claim. The proof of claim covered the same kind of taxes as the Debtor-filed proof of claim.

8. The IRS never assessed the tax. John R. Kolstad did not know prior to receiving the eve-of-confirmation proof of claim that the IRS desired to be treated as a creditor for the purposes of Chapter 11 Plan voting and distribution and intended to hold Debtor's Estate liable for \$85,882.67.

9. The issue in the Bankruptcy Court of whether the IRS' proof of claim superseded the Debtor's proof of claim was first heard and adjudicated in an objection to Chapter 11 plan confirmation contested matter on August 10, 1988. The proposed Chapter 11 Plan fixed and treated the IRS' claim for the amount specified in Debtor's proof of claim. The IRS objected to plan confirmation because the plan did not treat the IRS pursuant to the proof of claim filed on the eve of confirmation. The Bankruptcy Court found that under Bankruptcy Rules 3003(c) and 3004 the Debtor's proof of claim was the controlling proof of claim over the IRS' proof of claim, and confirmed the plan over the IRS' objection, subject to reconsideration pending resolution of the IRS' proof of claim contested matter.

10. Five (5) months later, the Bankruptcy Court, on cross motions for summary judgment in the proof of claim contested matter, ruled that the IRS' proof of claim controlled over the Debtor's proof of claim. The Fifth Circuit Court of Appeals affirmed.

11. The Bankruptcy Court found that Debtor's Chapter 11 Plan which fixed and treated the IRS' claim pursuant to Debtor's proof of claim in the amount of \$20,359.71, was proposed in good faith, as required by 11 U.S.C. § 1129(a)(3).

12. John R. Kolstad's creditor-negotiated Chapter 11 Plan, based on the Debtor-filed proof of claim for the IRS, will be rendered infeasible if the IRS' proof of claim is allowed, thus subjecting Debtor's Case to dismissal or conversion to Chapter 7 liquidation.

13. The Reorganized Debtor has complied with all terms, conditions, and payment schedules of the Plan, including all payments due under the Plan to the IRS, during the more than three (3) years since plan confirmation on August 10, 1988.

14. Currently pending in the Bankruptcy Court for October 22, 1991 hearing is the IRS' Motion to Dismiss or Convert the Bankruptcy Case. The IRS is requesting the Bankruptcy Court to dismiss or covert the Debtor's bankruptcy case on grounds that the confirmed Chapter 11 Plan allows and treats the IRS for the amount in Debtor's proof of claim rather than the amount in the IRS' proof of claim.

FEDERAL JURISDICTION IN THE COURTS BELOW

The United States Bankruptcy Court had jurisdiction to hear and determine the proof of claim contested matter pursuant to 28 U.S.C. §§ 1334, 157(a) and (b)(2)(B).

The United States District Court had jurisdiction to review the Bankruptcy Court's Judgement and Opinion pursuant to 28 U.S.C. § 158.

The United States Court of Appeals for the Fifth Circuit had jurisdiction to review the Bankruptcy Court and District Court Judgments and Opinions pursuant to 28 U.S.C. § 1291.

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

I. THE FIFTH CIRCUIT HOLDING.

The Court of Appeals held that a proof of claim filed by a debtor on behalf of the Internal Revenue Service ("IRS") reinstates the IRS' right to file a proof of claim, and thus an IRS proof of claim filed subsequent to the creditor's claims bar date supersedes the debtor's claim. Therefore, the IRS filed claim on the eve of plan confirmation is the controlling proof of claim, rather than the debtor-filed claim.

The initial problem with the Fifth Circuit's opinion is that even the sources cited for support contradict the Fifth Circuit's holdings.

A. The Advisory Committee Note to Rule 3004, as amended effective August 1, 1987, states:

If the creditor fails to file a claim, the debtor or trustee shall have an additional 30 days thereafter to file the claim. A proof of claim filed by a creditor supersedes a claim filed by the debtor or the trustee only if it is timely filed within the 90 days allowed under Rule 3002(c).

Fed. R. Bankr. P. 3004, Advisory Committee Note (1987).

B. *Collier on Bankruptcy* states:

The last sentence of Rule 3004 provides that a claim filed by the creditor supersedes the claim filed pursuant to Rule 3004. However, in order for the creditors' filing to supersede the Rule 3004 claim, the creditor's claim must be filed pursuant to Rule 3002 or Rule 3003(c), which ever is applicable. **THIS MEANS THAT THE CLAIM MUST BE FILED BY THE CREDITOR PRIOR TO THE BAR DATE.** Thus, if the creditor fails to file timely, the claim file pursuant to Rule 3004 will stand, although such claim, as with any other claim, will be subject to technical amendment. For example, a claim filed pursuant to Rule 3004 and objected to because of the omission of a copy of a promissory note on which it is based, clearly would be subject to curative amendment if the creditor then produces the note.

8 *Collier on Bankruptcy*, ¶ 3004.03, p. 3004-6 (15th Ed. 1989) & (15th Ed. 1991) (emphasis added).

C. The Fifth Circuit Opinion does not discuss the other contradicting authorities.

In re Hydorn, 94 B.R. 608, 612 (Bankr. W.D. Mo. 1988); *In re Guarantee Electric, Inc.*, 91 B.R. 164 (Bankr. M.D. Fla. 1988); Norton Bankr. Rules Pamphlet 1988 - 1989 Ed. (Editor's comment), p.190 (1989).

II. DETERMINING WHAT A RULE PROVIDES VS. WHAT A RULE SHOULD PROVIDE: THE COURT OF APPEALS INTERPRETED BANKRUPTCY RULE 3004 IN DIRECT CONTRADICTION TO THE PLAIN LANGUAGE OF THE RULE AND IN DIRECT CONTRADICTION TO THE INTERPRETATION SET FORTH IN THE ACCOMPANYING ADVISORY COMMITTEE NOTE.

A. DETERMINING WHAT A RULE ORDERED BY THE SUPREME COURT PROVIDES VS. WHAT THE RULE SHOULD PROVIDE. Petitioner recognizes the burdensome number of writs filed with this Court each year and that this Court is not a court of errors. The issues presented by this Case are not as profound as some of the constitutional issues previously presented to this Court or likely to be presented in the near future.

However, when a circuit court endeavors to determine what a Bankruptcy Rule ordered by the Supreme Court should be, rather than what the rule is, and thus blurs the judicial function with the legislatively delegated rule making function, a debtor should seek relief from this Court. A petition for writ is especially appropriate in this case because Bankruptcy Rule 3004 effects all Chapter 11 and Chapter 13 plans of reorganization in cases involving the Internal Revenue Service or other creditors with priority claims.

B. BANKRUPTCY RULES SUPERSEDE EQUITABLE DOCTRINES. Congress, in the legislative history to 11 U.S.C. § 501 and through 28 U.S.C. § 2075, specifically requests the Supreme Court of the United States to promulgate bankruptcy rules to implement the form and time requirements for proof of claims. New Bankruptcy Rule 3004 was promulgated by the Judicial Conference of the United States and effected by the Supreme Court of the United States, as of August 1, 1987.

The last sentence of Bankruptcy Rule 3004 specifically provides for the superseding, controlling, or amending effect of conflicting proof of claims filed by a debtor and a creditor. However, the Courts below, in the name of general legislative purpose and equity, eliminate the filing periods in Bankruptcy Rule 3004, and substitute in the Equitable Amended Claim Doctrine.

... [W]e call to the fore, the equitable maxim that "equity follows the law." This doctrine counsels the equitable principals, "of necessity, must comport to and remain compatible with the prevailing legislative intent." Derivatively, equity must comport with the rule making power vested by Congress in the Supreme Court. Such rules ... are not easily amenable to engraftment of equitable exception.

In re Harris Group, Inc., 64 B.R. 417, 420 (Bankr. E.D. Pa. 1986) (citation omitted); *cf. In re Adams*, 734 F.2d 1094 (5th Cir. 1984); *cf. In re Morrissey*, 717 F.2d 100 (3rd Cir. 1983).

III. EFFECT AND PRACTICAL PROBLEMS CREATED BY THE COURT OF APPEALS OPINION.

A. EFFECT OF HOLDINGS. The Court of Appeals' interpretation of Bankruptcy Rule 3004 allows the IRS to:

1. Ignore the Bankruptcy Rule 3003(c) proof of claims bar date;
2. Not file a request for authority to late file a proof of claim required by Bankruptcy Rule 9006(b);
3. Not file any objection, as provided in 11 U.S.C. § 502(a), to the debtor-filed proof of claim on behalf of the IRS; and
4. Not file any pleading or make any appearance in the bankruptcy case until after a Chapter 11 plan of reorganization is negotiated with the major secured creditors and other creditors, and then file a claim, virtually on the eve of the confirmation hearing which renders the Chapter 11 Plan of Reorganization infeasible and causes the bankruptcy case to recommence.

The Court of Appeals additionally holds that under the "Equitable Amended Claim Doctrine," a late "amendment" filed virtually on the eve of a plan confirmation hearing does not constitute sufficient prejudice to a debtor and other creditors to disallow the IRS' proof of claim.

B. CREATING POLICY: UNIVERSE OF PARTICIPANTS THEORY. The Court of Appeals Opinion introduces the "Universe of Participants" theory and creates legislative history, in response to the Court's concern that a debtor should not be able to gain unilateral control of the amount of the IRS' claim, subject the IRS to the deliberate filing of a very low claim, and fix beyond challenge the amount of an involuntarily participating creditor's claim.

One unaddressed competing concern is that a debtor and timely filing creditors should be able to formulate, negotiate and confirm a Chapter 11 plan without having to

start over when the IRS appears at the confirmation hearing with an "amended" claim. This concern is heightened by IRS claims because 11 U.S.C. § 1129(a)(9)(C) requires the IRS' priority claims to be paid in full, including post-confirmation interest, within six (6) years of the date of tax assessment or plan confirmation, whichever date is earlier. Therefore, flexibility is limited and debtor's attorneys usually need to establish IRS claim amount and treatment prior to determining what cash flow is available to pay other creditors through a plan.

C. PROBLEMS CREATED. In combination, these two holdings hinder debtors attempting to formulate a repayment plan, debtor's counsel attempting to advise their clients on reorganization alternatives, secured creditors attempting to negotiate "adequate protection packages" to protect their collateral in bankruptcy, creditors attempting to negotiate payment schedules or post-petition financing, and bankruptcy judges who are trying to quickly and efficiently administer and complete Chapter 11 cases.

The practical problem is that the Court of Appeals allows and therefore encourages the IRS to ignore the proof of claim bar dates in Chapter 11 and Chapter 13 cases. Under the Fifth Circuit Opinion, the IRS no longer needs to calendar the proof of claim bar date, rather should only calendar the plan confirmation hearing date. The IRS' involvement now begins at the end; the plan confirmation hearing. These problems are exasperated by the likely judicial popularity of the Fifth Circuit Opinion. *See e.g. In re Bishop*, 122 B.R. 96(Bankr. E.D. Mo. 1990).

D. EFFECT OF THE THREE (3) SEPARATE FILING PERIODS IS IGNORED. Omitted from the Court of Appeals' public policy consideration is that under Bankruptcy Rule 3004, the opportunity for debtor claim abuse arises only after the IRS fails to timely exercise its right to file a proof of claim prior to the expiration of the

creditor's claims bar date ordered pursuant to Bankruptcy Rule 3003(c). The Court of Appeals correctly states that there are three (3) separate time periods for filing proofs of claim: the creditor exclusive period; the debtor-creditor joint period; and the debtor exclusive period. *Kolstad*, 929 F.2d 171, 173, n.3. However, the Fifth Circuit Opinion gives no effect to the three (3) separate periods provided by Bankruptcy Rule 3003 and 3004, most significantly that a proof of claim filed by a creditor during the creditor exclusive period or the debtor-creditor joint period supersedes a debtor-filed proof of claim. Only a creditor-filed proof of claim filed during the debtor exclusive period, which commences subsequent to the expiration of the creditor's claims bar date, is superseded by a debtor-filed proof of claim. These time periods are not transferrable between creditors and debtors or trustees. *Fed. R. Bankr. P. 3003(c), 3004; In re Guarantee Electric, Inc.*, 91 B.R. 164 (Bankr. M.D. Fla. 1988).

IV. FUNDAMENTAL BANKRUPTCY POLICIES ARE ERADICATED BY THE JUDICIALLY CREATED PROOF OF CLAIM PROCEDURES FOR THE IRS AND OTHER PRIORITY CREDITORS.

A. EXPEDITIOUS JUDICIAL ADMINISTRATION OF BANKRUPTCY CASES. The United States Supreme Court has declared this fundamental bankruptcy policy.

When Congress enacted general revisions of the bankruptcy laws in 1898 and 1938, it gave "special attention to the subject of making [the bankruptcy laws] inexpensive in [their] administration. "Moreover, this Court has long recognized that a chief purposes of the bankruptcy laws is "to secure a prompt and effectual administration and settlement of the

estate of all bankrupts within a limited period

Katchen vs. Landy, 86 S.Ct. 467, 472 (1966) (citations omitted).

The Fifth Circuit has established that this fundamental policy permeates all aspects of a bankruptcy case. "The purpose of the bankruptcy laws is quickly and effectively to settle bankrupt estates." In re Robintech, Inc., 863 F.2d 393, 397-8 (5th Cir. 1989) (citing Katchen) (proof of claim bar date); In re Compton, 891 F.2d 1180, 1187 (5th Cir. 1990) (objection to dischargeability bar date).

The policy of expeditious administration of a bankruptcy case forms the basis of the command to Bankruptcy Courts to efficiently administer and close a bankruptcy case, and avoid unreasonable delay to both secured and unsecured creditors.

The inquiry under § 1112 is case-specific, focusing on the circumstances of each debtor. In the case of most Chapter 11 debtors, however, a plan of reorganization can be effectuated, if at all, within a matter of months, not years. ... The charge to the bankruptcy judge under § 1112, then, is to evaluate each debtor's viability and rate of progress in light of "the best interest of creditors and the estate".

In re Timbers of Inwood Forest Assoc., Ltd., 808 F.2d 363, 371-2 (5th Cir. 1987), aff'd 108 S.Ct. 626 (1988).

The Court of Appeals Opinion pervasively undercuts this policy by allowing the IRS an indefinite period of time to appear in a bankruptcy case. Under the Fifth Circuit's Opinion, there is no finality in tax claim allowance. A

debtor cannot force the IRS to proceed to determine a tax claim, to negotiate an allowable amount of tax claim, or to file a proof of claim.

B. DEBTORS' FRESH START.

... [T]here can never be a fresh start when creditors can avoid following the bankruptcy rules, either deliberately or through dilatoriness, but nevertheless hide in the wings ready to pounce upon the debtor just at the moment when he believes that he has finally paid his debts and regained financial stability ... This approach puts the burden on the debtor, rather than the creditor. This is contrary to the rule that it is the creditor's obligation to file a timely proof of claim.

In re Tomlan, 102 B.R. 790, 796 (D. E.D. Wa. 1989) *aff'd* 907 F.2d 114 (9th Cir. 1990); *cf. In re Compton*, 891 F.2d at 1187. Any policy, such as the "*Universe of Participants vs. Claims Adjudication*" theory created by the Fifth Circuit, which causes a bankruptcy case to be negotiated, litigated, and administered twice, together with the accompanying increased cost, contradicts the fresh start policy.

The purpose of Bankruptcy Rule 3004 is not to revive a creditor's right to file a proof of claim, rather is to protect the debtor's fresh start if the creditor's claim is non-dischargeable. "The purpose of this subsection [501(c)] is mainly to protect the debtor if the creditor's claim is nondischargeable." House Rep. No. 95-595, 95th Cong., 1st Sess. 351 (1977); Senate Rep. No. 95-989, 95th Cong., 2d Sess. 61 (1978) (reprinted in 1978 U.S. Code Cong. & Admin. News 5787) *et seq.*

"... [I]f the IRS does not share in the distribution, the taxes will not be discharged and will remain a burden on the

debtor, who has no other ability to pay them." It is clear from the concept embodied in Bankruptcy Rule 3004 that a debtor should be able to protect itself by filing a claim on behalf of a creditor which holds a nondischargeable claim, but has not timely filed it." *In re Kloeble*, 112 B.R. 379 (Bankr. S.D. Cal. 1990).

C. CREDITORS MUST PROTECT THEIR OWN RIGHTS. "Although *THE FILING OF A PROOF OF CLAIM MAY BE A PREREQUISITE TO THE ALLOWANCE OF CERTAIN CLAIMS*, no creditor is required to file a proof of claim." *In re Simmons*, 765 F.2d 547, 550 (5th Cir. 1985) (emphasis added). However, the issue in this Case is the consequence if the IRS elects or negligently fails to timely file a proof of claim.

Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated, *SHALL* file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule [the Rule 3003 bar date]; and creditor who fails to do so *SHALL NOT BE TREATED AS A CREDITOR WITH RESPECT TO SUCH CLAIM FOR THE PURPOSES OF VOTING AND DISTRIBUTION.*

Fed. R. Bankr. P. 3003(c)(2) (emphasis added). This language terminates the creditor's rights to protect itself, but is not addressed in the Court of Appeals Opinion.

D. PRIORITY CLAIMS ARE NOT ENTITLED TO SPECIAL CLAIMS FILING TREATMENT. SECTION 501(e) WAS NOT ENACTED. "Nor is one entitled to receive priority status if one has not met the statutorily mandated requirements, including the requirement of having

filed a timely proof of claim. ... *THE CODE GIVES NO SPECIAL TREATMENT FOR LATE FILING OF POTENTIAL PRIORITY CLAIMS.*" *In re Tomlan*, 102 B.R. at 795; *accord In re Border*, 116 B.R. 588 (Bankr. S.D. Ohio 1990); *accord In re Daniel*, 107 B.R. 798 (Bankr. N.D. Ga. 1989).

"The Rule [3004] permits the debtor or trustee to file a claim for any creditor. While the most obvious creditors for whom claims will be filed are taxing authorities which have nondischargeable debts, the rule is not so limited." 8 *Collier on Bankruptcy*, ¶ 3004.03, p. 3004-5 (15th Ed. 1991).

Senate Bill 2266 contained a Section 501(e) of the Bankruptcy Code.

The Bill [S.2266] also contains several provisions designed to minimize the administrative problems governmental tax authorities face, or may face, in collecting taxes in bankruptcy proceedings. ... Section 501(e) of the bill gives governmental tax units a minimum period of time within which to file proof of their claims in a title 11 proceeding.

S.Report No. 99, 95th Cong., 2nd Sess., pp. 14-15 (1978).

The rules governing time limits for filing proofs of claims will continue to apply under section 405(d) of the bill. These provide [sic] a 6-month-bar date for the filing of tax claims.

S.Report No. 99, 95th Cong., 2nd Sess., pp. 61 (1978).

The House amendment deletes section 501(e) of the Senate amendment as a matter to be left to the rules of bankruptcy procedure. It is anticipated that the rules will enable governmental units, *LIKE OTHER*

CREDITORS, to have a reasonable time to file proofs of claim in bankruptcy cases.

124 Cong Rec H11093 (daily ed. Sept. 28, 1978); S17410 (daily ed. Oct. 6, 1978); remarks of Rep. Edwards and Sen. DeConcini.

The Court of Appeals legislated what Congress refused to do: granting the IRS and other priority creditors special procedural treatment for filing proofs of claims.

V. THE COURT OF APPEALS APPLIES THE COMMON LAW EQUITABLE AMENDED CLAIM DOCTRINE CONTRARY TO WELL ESTABLISHED ELEMENTS: CREDITOR'S INTENT AND NO PREJUDICE.

A. CREDITORS' INTENT VS. DEBTORS' INTENT. "For an amended claim to be allowed in the absence of a prior written informal claim, the creditor in question must undertake some affirmative action to constitute sufficient notice that he has a claim against the estate." *In re Davis*, 936 F.2d 771, 775-6 (4th Cir. 1991); *In re South Atlantic Fin. Corp.*, 760 F.2d 814, 819 (11th Cir. 1985); *In re International Horizons, Inc.*, 751 F.2d 1213, 1217 (11th Cir. 1985) (citing *Wilkins*); *In re Wilkins vs. Simon Bros., Inc.*, 731 F.2d 462, 465 (7th Cir. 1984); *In re Commonwealth Corp.*, 617 F.2d 415, 420 (5th Cir. 1980). For purposes of Bankruptcy Rule 3004, one party's intent cannot be transposed to another party. *Guarantee Electric*, 91 B.R. at 166. On the facts of this Case, the IRS did nothing that would alert other parties to presence of its claim until after debtor timely filed a Bankruptcy Rule 3004 claim. *cf. Davis*, 936 F.2d at 776.

However, the Court of Appeals eliminates the distinction between a creditor's and a debtor's intent

provided in Bankruptcy Rules 3003(c) and 3004, and creates new common law expanding the Equitable Amended Claim Doctrine from a creditor amendment of a creditor claim, to a creditor amendment of a debtor claim.

B. THE CONFLICT IN THE APPLICATION OF THE ELEMENT OF PREJUDICE. The Court of Appeals Opinion departs from the common law application of the element of prejudice in determining proof of claim amendments by holding that an IRS amendment of a priority claim, by approximately three hundred percent (300%) of the amount of a previous proof of claim, ten (10) months subsequent to the bar date and virtually on the eve of plan confirmation, is not prejudicial to either the debtor or other creditors to debtor's estate.

The Fifth Circuit's application of "prejudice" seems to be in direct conflict with the Fourth Circuit's application of "prejudice", *In re Davis*, 936 F.2d 771, 775-6 (4th Cir. 1991), and the Tenth Circuit's application of "prejudice", *In re Centric Corp.*, 901 F.2d 1514, 1517 (10th Cir. 1990).

On the facts of this Case, any claim amendment, filed virtually on the eve of the plan confirmation hearing must be disallowed as prejudicial under the "equitable amended claim doctrine." *In re Centric Corp.*, 901 F.2d 1514, 1517 (10th Cir. 1990); *In re C.P.M. Constr.*, 124 B.R. 335, 338 (Bankr. N.M. 1991); *In re Standard Metals Corp.*, 48 B.R. 778, 788 (D. Colo. 1985); *aff'd on other grounds*, 817 F.2d 625.

The key prejudicial element is not the passage of time subsequent to the creditor's claims bar date, rather is the passage of time in combination with the debtor negotiating, formulating, and filing and noticing a Chapter 11 plan. *Centric*, 901 F.2d 1514. Additionally, "[a] delay

which hinders 'the objective of finality which the fixing of a bar date seeks to establish' has an adverse impact on efficient court administration." *Id.* at 1517. For example, the court deciding C.P.M. Construction, disallowed, on grounds of prejudice, a creditor amendment which reasonably related to that creditor's own timely creditor-filed original claim.

CIT [the creditor] received notice of the first and second disclosure statements and did not object to the amounts stated in either document. The debtors propounded a plan based on the two disclosure statements and the objections thereto, all the while treating CIT's claim as stated in the original proof of claim. CIT's increase of its claim by 75% just before the confirmation hearing is clearly prejudicial to these debtors. Therefore, CIT's amended proof of claim will not be allowed.

C.P.M. Constr., 124 B.R. 335 at 338; *cf. In re Bajac Constr. Co.*, 100 B.R. 524, 525 (Bankr. E.D. Cal. 1989); *cf. In re Major Mud & Chemical Co., Inc.*, 81 B.R. 412, 415 (Bankr. W.D. La. 1988).

VI. THE ADVISORY COMMITTEE ON BANKRUPTCY RULES WOULD BE ASSISTED IN DETERMINING WHAT BANKRUPTCY RULE 3004 SHOULD PROVIDE, AND RECOMMENDING AND PUBLISHING FOR COMMENT APPROPRIATE CHANGES, BY THIS COURT DETERMINING WHAT THE CURRENT BANKRUPTCY RULE 3004 PROVIDES.

On December 6, 1990, the Chapter 13 subcommittee to the Advisory Committee on Bankruptcy Rules considered whether Bankruptcy Rule 3004 should be amended with respect to allowing a debtor or trustee to file a proof of claim only after the expiration of time for the creditor to file under Bankruptcy Rules 3002 and 3003; whether the last sentence of Rule 3004 should be deleted; and whether an additional thirty (30) day period should be created to allow a creditor to supersede a debtor-filed proof of claim.

On April 24, 1991, the Chapter 13 subcommittee issued its report to the Advisory Committee on Bankruptcy Rules. Recommendation number 3 entitled "Rule 3004 Should Be Amended to Give a Secured Creditor an Opportunity to File, After the Bar Date, a Superseding Claim Replacing One Filed by the Debtor or Trustee". The recommended amendment, committee note, and subcommittee discussion are set forth in their entirety in Appendix F. The underlying basis of the discussion and premise for the recommended amendment is that Bankruptcy Rule 3004 as adopted in 1987 precludes a proof of claim filed by a creditor subsequent to the creditor's bar date from superseding a proof of claim timely filed by a debtor under Bankruptcy Rule 3004. See Appendix F. This discussion naturally progresses from the 1987 Advisory Committee Note to Bankruptcy Rule 3004 which specifies that a late filed creditor claim does not supersede a debtor claim timely filed under Bankruptcy Rule 3004. See Appendix E.

At the meeting of the full Advisory Committee on Bankruptcy Rules in June 1991, the evolution of Bankruptcy Rule 3004 was halted. The fourteen member Advisory Committee could not agree on what Bankruptcy Rule 3004 currently provides, or on what Bankruptcy Rule 3004 should provide. The disagreement resulted in the subcommittee's proposed amendment not even being published for comment in the August 1991 "Preliminary Draft of Proposed

Amendments to the Federal Rules of Bankruptcy Procedure", which are set for public hearings on January 24, 1992. The conflict between the 1987 Advisory Committee Note and the Kolstad Opinion, and the fact that a judge who sat on the Kolstad Fifth Circuit Panel is now a member of the Advisory Committee on Bankruptcy Rules, contributed to the committee not proposing any changes to Bankruptcy Rule 3004.

It would have been appropriate for the Committee to amend the conflict between the Kolstad Opinion and those court opinions which will likely adopt Kolstad, and the clear language of the Bankruptcy Rule 3004 and the accompanying 1987 Advisory Committee Note.

This Court could assist the evolution of Bankruptcy Rule 3004 by now resolving what Bankruptcy Rule 3004 currently provides. This Court's decision would facilitate the Advisory Committee on Bankruptcy Rules, rather than the judiciary, to focus on what Bankruptcy Rule 3004 should be.

CONCLUSION

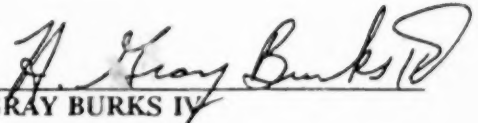
The facts of the Kolstad case present a laboratory for determining the questions of what Bankruptcy Rule 3004 currently provides, and what Bankruptcy Rule 3004 should provide. The judiciary's role is to interpret what the Rule provides. The Advisory Committee on Bankruptcy Rules' role is to determine what the Rule should provide. The Court of Appeals' Opinion encroaches on the Advisory Committee's role and the legislative rule making function.

{Page 25}

Petitioner prays that this Court restore the separation of judicial and rule making power.

Respectfully submitted,

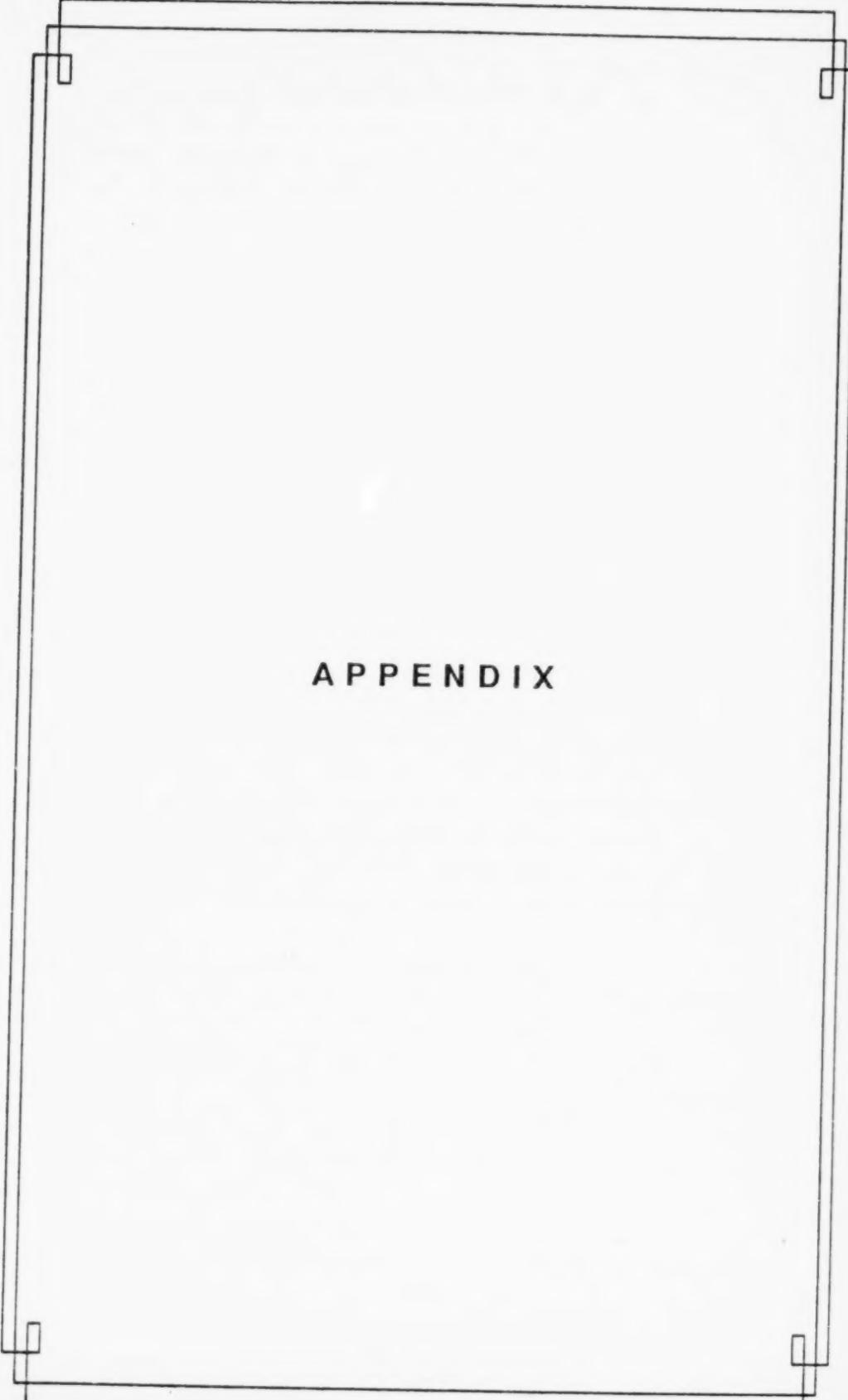
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ATTORNEY FOR THE PETITIONER,
JOHN R. KOLSTAD





APPENDIX

(APPENDIX A)

In re JOHN R. KOLSTAD, Debtor.

**UNITED STATES OF AMERICA
(INTERNAL REVENUE SERVICE),
Plaintiff-Appellee,**

v.

**JOHN R. KOLSTAD,
Defendant-Appellant.**

No. 90-2280.

United States Court of Appeals,
Fifth Circuit.

[Filed April 10, 1991.]

H. Gray Burks, IV, Houston, Tex., for defendant-appellant.

Christopher S. Cole, Dept. of Justice, Dallas, Tex., Janet K. Jones, Gary R. Allen, Gilbert S. Rothenberg, Atty. U.S. Dept. of Justice, Tax Div., Appellate Section, Washington, D.C. for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, JONES, and SMITH, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The issue in this case is whether the bankruptcy court properly permitted IRS to "amend" Kolstad's debtor-filed

proof of claim, 11 U.S.C. § 501(c) and Bankruptcy Rule 3004, some months after the bar date had passed for IRS to file its own proof of claim. Bankruptcy Rule 3003(c). We conclude that the bankruptcy court, 101 B.R. 492 (Bankr. S.D. Tex. 1989), affirmed by the district court, did not abuse its discretion in permitting the amendment.

A. The Facts

The parties agree on virtually nothing except the pertinent facts. Kolstad sought Chapter 11 relief in March, 1987; his bankruptcy schedule identified IRS as a creditor for personal income tax and employee withholding taxes, in an amount labeled "disputed." IRS was aware of the bankruptcy case. The court's notice of the first meeting of creditors set August 17, 1987, as the bar date for filing proofs of claim. IRS failed to file a claim. Kolstad undertook to remedy this defect by filing, thirty days after the bar date, a \$20,359.71 claim on behalf of IRS. 11 U.S.C. § 501(c) and Bankruptcy Rule 3004.¹ About ten months later, within a short time before the hearing on debtor's proposed plan of reorganization, IRS filed an "amended" proof of claim to cover the same kind of taxes, company employment taxes for which Kolstad was personally liable,² but to assert that the correct amount owed is \$85,882.67. The bankruptcy court permitted IRS to amend. Kolstad contests the amendment vigorously because

1. Rule 3004 states: If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days after expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith mail notice of the filing to the creditor, the debtor and the trustee. A proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee.

2. 26 U.S.C. § 6672.

he fears he will be unable to confirm a plan burdened by this large priority tax claim.

B. Standard of Review

Both the bankruptcy court and district court granted summary judgment for the IRS. The parties dispute the appellate principles of review, although they are reasonably clear-cut. The courts' reasoning on issues of law must be appraised *de novo*. Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1307 (5th Cir. 1985). If we conclude that bankruptcy law permits equitable amendments to a debtor-filed proof of claim, the courts' decision to allow the amendment is reviewed for an abuse of discretion. In re International Horizons, Inc., 751 F.2d 1213, 1216 (11th Cir. 1985).

C. Discussion

The debtor's argument is deceptively framed as resting solely on 11 U.S.C. § 501 and Bankruptcy Rule 3003(c) and 3004. The Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, permits a debtor or trustee to file a proof of claim for a creditor who does not timely file on its own behalf. 11 U.S.C. § 501(c). Implementing this provision, Bankruptcy Rule 3004 authorizes the debtor or trustee to file a creditor's proof of claim within thirty days after the Chapter 11 bar date prescribed according to Bankruptcy Rule 3003(c), which in this case was August 17, 1987.³ A creditor

3. Kolstad is probably correct, although it does not advance his argument, in asserting that Rules 3003(c) and 3004 set up three time periods for filing proofs of claim: (a) the creditor's exclusive period, which runs until the § 341 first meeting; (b) the joint period from the date of the first meeting until the claims bar date, during which either a creditor or a debtor may file on the creditor's behalf; and (c) the debtor's exclusive period to file a claim for the creditor, which lasts thirty days after the bar date.

who fails to file its proof of claim before the bar date, and who fails timely to request an extension of time to file, see Bankruptcy Rule 9006(b), may not file a late claim and participate in the voting or distribution from the debtor's estate. Bankruptcy Rule 3003(c)(2); *In re Vertientes, Ltd.*, 845 F.2d 57, 60 (3d Cir. 1988); *Maressa v. A.J. Robins Co., Inc.*, 839 F.2d 220, 221 (4th Cir.), cert. denied, 488 U.S. 826, 109 S.Ct. 76, 102 L.Ed.2d 53 (1988); *In re South Atlantic Financial Corp.*, 767 F.2d 814, 817 (11th Cir. 1985), cert. denied, 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311 (1986).

The debtor contends that IRS lost its right to file its own, higher proof of claim when the bar date passed and it neither filed nor requested an extension of time. Further, Kolstad contends, the IRS cannot avoid the bar date simply because the debtor elected to file a proof of claim and so bring IRS within the scope of his reorganization proceeding. The bankruptcy rules furnish the exclusive time periods in which a creditor may assert a claim; the debtor's assertion of the creditor's claim *after* the creditor's bar date has passed cannot reinstate the creditor's ability to protect itself.

This analysis is plausible only because it neglects to encompass all of the Code provisions and rules that bear upon the claims process in bankruptcy. To determine whether IRS was authorized to amend Kolstad's proof of claim for it, we must consider more broadly the role of bar dates and claims adjudication in bankruptcy cases. Although bankruptcy law has elements of gamesmanship and the consequences for missing various bankruptcy deadlines are severe⁴, the bankruptcy law is not supposed to function

4. See, e.g., Rule 3003(c)(2) (deadline for filing proofs of claim); Rule 4007(c) and (d) (deadline for filing complaints to determine dischargeability of a debt).

merely as a procedural gauntlet that only the most adroit or best represented creditors can overcome. The deadlines have a purpose: they enable a debtor and his creditors to know, reasonably promptly, what parties are making claims against the estate and in what general amounts.⁵ The claims filing deadlines, however, by no means fix in stone the final "allowed" amounts of claims.⁶ The proof of claim is prima facie evidence of the amount and origin of the debt owed, Bankruptcy Rule 3001(f), but any party in interest may object to a proof of claim. 11 U.S.C. § 502(a); Bankruptcy Rule 3007 (objections); 3008 (reconsideration of claims). There is no bar date or deadline for filing objections. Once an objection is filed, the final amount of the claim is determined by litigation in an adversary proceeding. See Bankruptcy Rules 7001 *et seq.* Such litigation may end in a settlement agreement providing for a compromise claim that, although it represents a bargained rather than actual amount of the debt owed, may pass muster with the creditors who have to approve it. Thus, while bar dates establish the universe of participants in the debtor's case, they have little correlation to the final relative amounts in which creditors will share any distribution. The goal of claims adjudication, on the other hand, is to assure that each creditor *which is part of that universe* ultimately participates in the voting and distribution from the estate in the proper amount determined by the priority and nature of its claim and bankruptcy's bargaining process.

5. Similarly, deadlines for filing complaints against the discharge or dischargeability of a particular claim are timed to put the parties on early notice whether a debtor may fail to achieve these most desired rewards of the bankruptcy process.

6. This is not to detract from the fact that proofs of claim are declared under penalty of perjury, but to recognize that parties often legitimately disagree on the amount and legal basis for claims.

Congress authorized a debtor or trustee to file a proof of claim for a creditor in order to broaden the scope of participation in the bankruptcy case and thus facilitate the debtor's march toward rehabilitation. 3 *Collier on Bankruptcy* ¶ 501.03 (15th ed. 1988). Kolstad's brief acknowledges the problem that he confronted and its statutory solution. IF IRS, as a creditor with a non-dischargeable claim, elected not to participate in the bankruptcy case and not to file a claim, the debtor would remain burdened by that debt following bankruptcy. See, e.g., 11 U.S.C. § 523(a)(1) (declaring certain tax debts non-dischargeable); *In re Kloeble*, 112 B.R. 379, 381-82 (Bankr. S.D. Cal. 1990). Not only would this fact threaten the debtor after bankruptcy, but it might also prevent him from confirming a plan of reorganization covering creditors who are before the court. On account of the non-discharged debt, the debtor might become unable to establish that the plan is "feasible." 11 U.S.C. §§ 1129(a)(11) and (b). Section 501(c) empowered the debtor to force IRS to participate in the bankruptcy and subject its debt to dischargeability. 11 U.S.C. § 1129(a)(9)(C) (tax debts covered by the plan are fully discharged). Kolstad took advantage of this provision.

Having so employed § 501(c), Kolstad now seeks additionally to prevent the IRS from attempting to prove the correct amount of taxes he owed. Here we part company with Kolstad. The fact that 501(c) and Rule 3004 may be invoked to force IRS to participate in the reorganization process does not mean that Kolstad also gains unilateral control of the amount of IRS's claim. If a Rule 3004 proof of claim permitted a debtor to fix beyond challenge the amount of the involuntary participant's claim, the debtor would also control that creditor's share of the distribution from his estate. Such an interpretation of Rule 3004 carries a serious potential for abuse, because it would foster the deliberate filing of a very low claim on behalf of a creditor. This perverse incentive is, however, not inherent in Rule 3004.

The problem is that Kolstad's interweaving of the Rule 3003(c) and 3004 bar dates confuses their role with that of claims adjudication. As has been shown, the final determination of the allowed amount of a claim, and thus its relative share of distribution, is not the function of bar dates so much as of the claims adjudication process. Rule 3004 sets a time limit upon the debtor's decision to file a proof of claim for a creditor for the same reason that bar dates impose deadlines upon creditors' proofs of claim. See In re Kloeble, 112 B.R. at 381-82. Once a claim is timely filed under Rule 3004, however, the essential role of the bar date has been fulfilled. The process of claims adjudication may then adjust the rights of creditors amount themselves.

Consistent with our view of the comparative roles of bar dates and claims adjudication is the allowance of amended proofs of claim. Amendments to timely creditor proofs of claim have been liberally permitted to "cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in original claim." In re International Horizons, Inc., 751 F.2d at 1216. Amendments do not vitiate the role of bar dates: indeed, courts that authorize amendments must ensure that corrections or adjustments do not set forth wholly new grounds of liability. Matter of Commonwealth Corp., 617 F.2d 415, 420 (5th Cir. 1980). Amendments to IRS proofs of claim have been allowed or disallowed on these grounds in numerous cases. In re Bajac Const. Co., 100 B.R. 524, 525 (Bankr. E.D. Cal. 1989); In re Calisoff, 94 B.R. 1002 (Bankr. N.D. Ill. 1988); In re Hanscom Retail Foods, 96 B.R. 33 (Bankr. E.D. Pa. 1988); In re Richmond, 92 B.R. 713 (Bankr. S.D. Tex. 1988), *aff'd*, 105 B.R. 14 (S.D. Tex. 1989); United States v. Owens, 84 B.R. 361, 363-64 (Bankr. E.D. Pa. 1988); In re Butcher, 74 B.R. 211, 217 (Bankr. E.D. Tenn.), *aff'd*, 75 B.R. 441 (E.D. Tenn. 1987), 848 F.2d 189 (6th Cir. 1988); In re Johnson, 55 B.R. 800, 806 (Bankr. E.D. Va. 1985); In re

Simms, 40 B.R. 186, 190 (Bankr. N.D. Ga. 1984). If Kolstad were correct in arguing that allowing an amended proof of claim improperly circumvents the bar date rules, his argument would also undermine the well-established amendment process for timely claims. The durability of that process, however, reinforces our conclusion that bar dates do not inevitably strait jacket creditors in incorrect claims.

Further, we perceive no convincing reason why amendments should be allowed to timely creditor claims but not to timely claims filed by debtors to obtain an advantage for themselves vis-a-vis nondischargeable creditors. One prominent treatise agrees. 8 *Collier on Bankruptcy* ¶ 3004.03 (15th ed. 1988). See also *In re Frascatore*, 98 B.R. 710, 722-23, n. 11 (Bankr. E.D. Pa. 1989). In response, Kolstad contends that by allowing a timely creditor's proof of claim to "supersede" that filed by a debtor, Rule 3004 impliedly negates a later-filed creditor "amendment". This argument misinterprets the pertinent terms, however, for a "superseding" claim by its nature may include a broader spectrum of demands against the debtor than an "amendment," which, as noted, must adjust or correct the terms of the claim originally filed. We conclude that the bankruptcy court had discretion to authorize IRS to amend Kolstad's proof of claim for federal taxes.

Whether the court abused its discretion is the next question before us, and we find no such abuse here.⁷ First, the principle concern of claims amendments, that no new claim be tardily asserted, is absent. IRS's amended claim simply alleges a higher amount owed by Kolstad for the same type of employment tax liability stated in Kolstad's § 501(c) claim. Compare United States v. Owens, 84 B.R. 361 (E.D. Pa. 1988) (1981 tax claim was "new and different" from 1983 tax year claim already filed by IRS) and In re Norris Grain Co., 81 B.R. 103 (Bankr. M.D. Florida 1987) (IRS not permitted to amend claim to add over \$1 million in corporate tax liability to previously filed claim for about \$365 interest on prior return). Second, neither the creditors nor Kolstad could have been surprised by the amendment because Kolstad originally listed the tax debt as "disputed" and was negotiating with IRS about its amount shortly before he sought bankruptcy relief. Third, if IRS's amended claim is correct, its allowance will not be unfair to other creditors,

7. Many courts ruling on amendments to IRS bankruptcy proofs of claim have employed a five-factor test described in In re Miss Glamour coat Co., 80-2 U.S.T.C. ¶9737 (S.D. N.Y. 1980), whose elements include: whether the debtors and creditors relied upon the government's earlier proof of claim or whether they had reason to know that later proofs of claim would follow upon completion of audit; whether the other creditors would receive a windfall to which they are not entitled if the court disallowed the IRS amendment; whether the IRS intentionally or negligently delayed in filing the proof of claim stating the amount of taxes due; the justification, if any, for IRS's failure to request an extension of time for the submission of further proofs pending an audit; and whether any other equitable consideration should be taken into account. See In re International Horizons, Inc., 751 F.2d at 1216. While helpful, these considerations are overlapping and seem to subsume two general questions: (1) whether IRS is attempting to stray beyond the perimeters of the original proof of claim and effectively file a "new" claim that could not have been foreseen from the earlier claim or events such as an ongoing or recently commenced audit; and (2) the degree and incidence of prejudice, if any, caused by IRS's delay.

for they would have achieved an undeserved windfall from a denial of the amendment. Finally, although we are troubled that IRS delayed filing its amended claim until virtually the eve of the confirmation hearing, leading the debtor to propose a plan based on the lower amount of federal tax indebtedness, we assume that the able bankruptcy judge balanced this factor against others within favor of the amendment. If IRS's amendment is correct, then Kolstad seriously, if inadvertently, understated his employment tax liability and should not take unfair advantage of that fact in his reorganization efforts.

Because the bankruptcy court had the power to permit IRS to amend Kolstad's § 501(c) federal tax claim, and he did not abuse his discretion in permitting the amendment, the judgments of the district and bankruptcy courts are AFFIRMED.

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 90-2280

D.C. Docket No. H-89-489

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V.

JOHN R. KOLSTAD,
Defendant-Appellant.

Appeal from the United States
District Court for the Southern District of Texas

[Filed April 10, 1991.]

Before REAVLEY, JONES, and SMITH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the district and bankruptcy courts are affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: July 8, 1991.

(APPENDIX B)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS**

CIVIL ACTION NO. H-89-489

**Bankruptcy Case Number
87-02839-H1-11**

**JOHN R. KOLSTAD,
Plaintiff,**

VS.

**UNITED STATES OF AMERICA
(INTERNAL REVENUE SERVICE),
Defendant.**

[Filed February 16, 1990]

OPINION ON AFFIRMANCE

1. *Introduction.*

This is an appeal from the bankruptcy court's determination that allowed the IRS to amend a proof of claim ten months after the time for filing claims had expired, if the debtor has filed a claim for it.

2. *Background*

The IRS and Kolstad dispute no fact.

A. Kolstad filed a bankruptcy petition under

- B. The bar date of August 17, 1987, for proofs of claim was fixed.
- C. The IRS filed no proof of claim.
- D. Kolstad filed a proof of claim September 16, 1987, for the IRS for \$20,359.71.
- E. The IRS amended the proof of claim June 15, 1988, for \$85,882.67.
- F. Kolstad objected to the amended claim.

3. *The Rules.*

The rules allow a debtor to file a proof of claim for the creditor within thirty days after the bar date if the creditor has not filed. 11 U.S.C. 501 and B.R. 3004. The issue is: Can a creditor amend a debtor-filed proof of claim when the creditor has not filed a proof of claim before the bar date? B.R. 3003(c). Specifically can the IRS claim \$85,882.67 instead of \$20,359.781 by amending, after the deadline has passed, a proof of claim filed on time for it by the debtor?

4. *Discussion*

The bankruptcy court allowed the IRS to amend the proof of claim explaining, "The only difference between the original proof of claim and the amended one lies in calculations used by the parties." The difference between the claims is \$65,522.96.

Amendments to proofs of claims should, in the absence of contrary equities, be free permitted. *In re W. T. Grant Companies*, 53 B.R. 417 (S.D.N.Y. 1985). the amended proof of claim cured a defect in the original claim,

amended proof of claim cured a defect in the original claim, and it merely increased the amount from the same generic origin. Although the quantum of increase is substantial, the nature of the liability is not different from that initiated by the debtor.

No competing equity appears. Kolstad did not lose an opportunity to object to the claim in either its original or amended state. While candor and promptness are intrinsically good in litigation, when no disadvantage is visited on the adverse party nor an inconvenience imposed on the court, no reason exists to disallow an otherwise sustainable claim.

5. Conclusion

The IRS's amended claim will be allowed, and the bankruptcy court will be affirmed.

Signed on February 14, 1990, at Houston, TX.

_____/S/_____
Lynn N. Hughes
United States District Judge

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS**

CIVIL ACTION NO. H-89-489

Bankruptcy Case Number
87-02839-H1-11

JOHN R. KOLSTAD,
Plaintiff,

VS.

UNITED STATES OF AMERICA
(INTERNAL REVENUE SERVICE)
Defendant.

FINAL JUDGMENT

[Filed February 16, 1990]

The judgment of the bankruptcy court is affirmed.

Signed on February 14, 1990, at Houston, Texas.

_____/S/_____
Lynn N. Hughes
United States District Judge

(APPENDIX C)

In re John R. KOLSTAD, Debtor.

UNITED STATES OF AMERICA
(INTERNAL REVENUE
SERVICE), Movant,

vs.

John R. KOLSTAD, Respondent.

Bankruptcy No. 87-02839-H1-11.

United States Bankruptcy Court,
S.D. Texas,
Houston Division.

January 4, 1989.

SUMMARY JUDGMENT OPINION

MANUEL D. LEAL, Bankruptcy Judge.

Pending before this court are two motions for summary judgment. One motion is by debtor John R. Kolstad ("Kolstad"), seeking a ruling that the proof of claim filed by the Internal Revenue Service ("IRS") is time barred. The other is by IRS requesting that its amended proof of claim be allowed. After careful consideration of the pleadings and stipulation the court grants IRS's motion and denies debtor Kolstad's motion.

This court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157, and the order of

Reference of Bankruptcy Cases and Proceedings *Nunc Pro Tunc* issued August 9, 1984 by the Chief District Judge of the Southern District of Texas. Jurisdiction over this contested matter is specifically granted to this court by 28 U.S.C. § 157(b)(2)(B) which provides that a core proceeding includes the allowance or disallowance of claims against the estate.

Both sides agree that there are no disputed issues of fact as they have stipulated all relevant facts. Kolstad filed a bankruptcy petition under chapter 11 on March 23, 1987. The Clerk of the Bankruptcy Court served an Order for Meeting of Creditors and Fixing Time for Filing Objections to Discharge and Applications to Determine Dischargeability of Debts setting a bar date of August 7, 1987 for filing proof of claims. IRS did not file its proof of claim within the time period. on the final day for filing proofs of claim debtor Kolstad filed a \$20,359.71 proof of claim for IRS with this court pursuant to 11 U.S.C. § 501 and Bankruptcy Rule 3004. These allow the debtor to file a proof of claim in the name of the creditor where the creditor has not done so within thirty (30) days after expiration of the time for filing claims prescribed by Rule 3003(c). IRS then amended the proof of claim after the time period had elapsed for filing original proofs of claim by increasing it to \$85,882.67. Kolstad now objects on the ground that IRS is time barred to change the \$20,359.71 figure.

Motion for summary judgment in Bankruptcy proceedings are governed by Federal Rules of Civil Procedure 56(c), and are applicable to this proceeding pursuant to Federal Rules of Bankruptcy Procedure 7056. Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Furthermore, the moving party has the burden of establishing that he is entitled to summary judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Both sides agree there is no genuine issue as to any material fact and there is only one issue for this court to decide. Can the creditor amend the debtor's Proof of Claim when the creditor does not timely file a Proof of Claim under Bankruptcy Rule 3003(c) and the debtor files a Proof of Claim on behalf of the creditor under 11 U.S.C. § 501 and Bankruptcy Rule 3004? Yes, under the facts of this dispute.

There is no requirement of any creditor to file a proof of claim. *In re Simmons*, 765 F.2d 547, 551 (5th Cir. 1985). H.R.Rep. No 595, 95th Cong., 1st Sess. 351 (1979), *reprinted in* 1978 U.S.Code Cong. & Ad. News 5963, 607 (hereinafter cited as House Report); S.Rep. No. 989, 95th Cong., 2nd Sess. 61, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5847 (hereinafter cited as Senate Report). 11 U.S.C. § 501 permits a creditor, or debtor in creditor's absence, to file a proof of claim where some purpose would be served. The filed proof of claim is prima facie evidence of the claim with regard to its validity and amount, unless a party in interest objects. 11 U.S.C. § 502(a), Bankr.R. 3001(f). A party is interest who does file a proof of claim is eligible to vote on a plan of reorganization and to participate in the distribution of the assets unless the claim is disallowed. Applying these principles to the stipulated facts, it is clear that the IRS does hold a valid claim entitling it to vote and receive a distribution because a valid proof of claim was timely filed on its behalf by the debtor which has not been disallowed.

On the face of the relevant stipulated facts, there is

no difference between the claim filed by debtor Kolstad and the one by IRS except as to the amount. Kolstad by having filed a claim on behalf of IRS admits IRS has a valid lien and is entitled to a distribution not to exceed \$20,359.71. IRS claims an entitlement of \$85,882.67. Other than the amounts there is no difference between the original and the amended proof of claim that has been brought to this court's attention. Both sides agree in essence that IRS can vote and participate in the distribution of debtor's assets. The only dispute is whether IRS can participate up to \$85,882.67 instead of \$20,359.71 by amending a proof of claim timely filed on its behalf of the debtor after the expiration of deadlines for filing original proofs of claims.

Amendments to proofs of claims should in the absence of contrary equitable considerations or prejudice to the opposing party be freely permitted. *In re W. T. Grant Companies* 53 B.R. 417 (S.D.N.Y. 1985). Amendments are not automatic but are allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery based on the same facts set forth in the original claim. *Id.* In setting a bar date, the court prescribes a statute of limitations which has been characterized as a prohibition and been viewed as peremptory. *Id.* at 420. It is wholly inappropriate to use an amendment as a device for filing, after the statutory period, a claim based on a cause of action of which no notice has been given to the debtor. *Id.* at 421. Case law holds that amendments after the bar date are to be scrutinized very closely to insure that the amendment is in fact genuine and not an entirely new claim. *Id.*

Careful consideration of the stipulated facts permissible under the rules for summary judgments clearly demonstrate no new claim being asserted by IRS. It appears in the light most favorable to debtor Kolstad that

the only difference between the original proof of claim and the amended one lies in the calculations used by the parties. In fact, debtor does not appear to dispute the tax liability but only argues that an offset or credit should be applied for payments to IRS from other sources. In other words, the basis giving rise to the tax liability is the same. Since this is all that has been presented to this court, under the law IRS' amendment must be allowed.

After careful consideration, Kolstad has failed to show that he is entitled to judgment as a matter of law, and summary judgment must be denied. A separate order is being issued.

In re John R. KOLSTAD, Debtor.

**UNITED STATES OF AMERICA
(INTERNAL REVENUE
SERVICE), Movant,**

vs.

John R. KOLSTAD, Respondent.

**Bankruptcy No. 87-02839-H1-11.
(CHAPTER 11)**

O R D E R

Came on for consideration before the court, The Honorable Manuel D. Leal, United States Bankruptcy Judge presiding and the issues having been duly considered and a decision having been rendered pursuant to a memorandum opinion.

The motion for summary judgment filed by the Internal Revenue Service is granted allowing its amended proof of claim.

The motion for summary judgment filed by John R. Kolstad is denied.

Signed this the 4 day of January, 1989.

_____/S/_____
Manuel D. Leal
United States Bankruptcy Judge

(APPENDIX D)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 90-2280

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,**

vs.

**JOHN R. KOLSTAD,
Defendant-Appellant.**

**Appeal from the United States District Court for the
Southern District of Texas**

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Opinion April 10, 1991, 5 Cir., 199_, _____ F.2d _____)

(Filed June 27, 1991)

Before REAVLEY, JONES, and SMITH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____/S/_____
Edith H. Jones
United States Circuit Judge

(APPENDIX E)

Rule 3004. Filing of Claims by Debtor or Trustee.

If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days after expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith mail notice of the filing to the creditor, the debtor and the trustee. A proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee.

Advisory Committee Note (1987)

Under the rule as amended, the debtor or trustee in a chapter 7 or 13 case has 120 days from the first date set for the meeting of creditors to file a claim for the creditor. During the first 90 days of that period the creditor in a Chapter 7 or 13 case may file a claim as provided by Rule 3002(c). If the creditor fails to file a claim, the debtor or trustee shall have an additional 30 days thereafter to file the claim. A proof of claim filed by a creditor supersedes a claim filed by the debtor or trustee only if it is timely filed within the 90 days allowed under Rule 3002(c).

(APPENDIX F)

TO: Advisory Committee on Bankruptcy Rules
FROM: Subcommittee on Chapter 13
RE: Report of the Subcommittee
DATE: April 24, 1991

[Pages 12-13 of Report]

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3. RULE 3004 SHOULD BE AMENDED TO GIVE A SECURED CREDITOR AN OPPORTUNITY TO FILE, AFTER THE BAR DATE, A SUPERSEDING CLAIM REPLACING ONE FILED BY THE DEBTOR OR TRUSTEE.

The Subcommittee recommends the following amendment to Rule 3004:

Rule 3004. Filing of Claims by
Debtor or Trustee

If a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, the debtor or trustee may do so in the name of the creditor, within 30 days after expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith mail notice of the filing to the creditor, the debtor and the trustee. A proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee. A proof of claim filed by a secured creditor before expiration of the time for filing claims prescribed by Rule 3002 or 3003(c), or within 30 days

after a proof is filed by the debtor or trustee in the name of the secured creditor pursuant to this rule, whichever is later, shall supersede the proof filed by the debtor or trustee.

COMMITTEE NOTE

This rule is amended to give a secured creditor ample opportunity to file a proof of claim to supersede a proof filed on its behalf by the debtor or trustee. Pursuant to § 506(d) of the Code, a lien is not void if a secured claim is not allowed only because a proof of claim has not been filed. Therefore, a secured creditor may choose to refrain from filing a proof of claim without the lien becoming void. However, if the debtor or trustee files a proof on behalf of the secured creditor, the creditor should have the opportunity to file a superseding proof even if the time for filing proofs has expired.

SUBCOMMITTEE DISCUSSION

If the bar date passes, and the debtor files a proof of claim for an unsecured creditor, there is no reason to permit the creditor to file a superseding claim. In essence, that claim is time barred and should not be resurrected except to the extent that the debtor wishes to do so.

However, it has been suggested that the rule should be different for secured creditors. Suppose that secured creditor decides to refrain from filing a proof of claim and to have its lien "ride through" under § 506(d). Of course, there is nothing wrong with the creditor doing this. Then, after the bar date, the debtor files a claim on its behalf, but understates the value of the collateral or the amount of the debt. It was suggested that the secured creditor in that event, "dragged into the case", should have an opportunity to "correct the record" by filing a superseding claim.

This proposed change was approved by the Advisory Committee at the January 1991 meeting in a preliminary vote (only one opposed).

